

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000201-001 DT

07/23/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

ANDREW M DAVIDSON

v.

RICARDO ROMAN GARDEA (001)

MARK N WEINGART

REMAND DESK-LCA-CCC

TEMPE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number 13-019735-1.

Defendant-Appellant Ricardo Roman Gardea (Defendant) was convicted in Tempe Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his request for a voluntary act instruction. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On May 24, 2013, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); speed greater than reasonable and prudent, A.R.S. § 28-701(A); and failure to drive in one lane, A.R.S. § 28-729(1). Prior to trial, Defendant's attorney asked the trial court to give a voluntary act instruction based on Defendant's claim he did not know that the liquid he drank contained alcohol. (R.T. of Mar. 7, 2014, at 5-6.) The trial court said it would resolve the issue later. (*Id.* at 14.)

At trial, Officer Casey Marsland testified that, on May 24, 2013, at about 7:30 p.m., he saw a vehicle traveling faster than the other vehicles in the area. (R.T. of Aug. 20, 2014, at 19, 22-24.) He paced that vehicle and determined it was traveling at 51 miles per hour in a 25 mile-per-hour zone. (*Id.* at 25, 28.) He also saw the vehicle cross into the bicycle lane on two occasions. (*Id.* at 26.) He stopped the vehicle and approached the driver, whom he identified as Defendant. (*Id.* at 26-27.) He noted Defendant had very bloodshot, watery eyes and slurred speech. (*Id.* at 28.) He performed an HGN test on Defendant and saw six out of six cues. (*Id.* at 29-31.) He said Defendant said he had taken Vicodin that afternoon and may have had one drink on the way home. (*Id.* at 32-34, 42.) Defendant said he had drank two cups or two shots of "Tezwin" or "Tesquin," which Officer Marsland said Defendant described as "a traditional Apache alcohol." (*Id.* at 41-42, 49, 82.)

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Officer Marsland placed Defendant under arrest and had him transported to the DUI van. (R.T. of Aug. 20, 2014, at 34.) The results of the breathalyzer test showed BAC readings of 0.147 and 0.148. (*Id.* at 37–40, 51.)

Defendant testified and denied taking Vicodin or drinking alcohol that day. (R.T. of Aug. 20, 2014, at 56, 60–61, 73.) He was in pain from his hip joint so he went to see a Corondero, which he described as a medicine man. (*Id.* at 62–63.) He said the Corondero gave him some Tesquin to drink, which he said was the consistency of a thick syrup. (*Id.* at 64.) He said that made the pain go away. (*Id.* at 65.) He said he told Officer Marsland Tesquin was an “Apache medicine.” (*Id.* at 72.) He said he did not know whether it contained alcohol. (*Id.*)

After the conclusion of the testimony, Defendant’s attorney again asked for a voluntary act instruction. (R.T. of Aug. 20, 2014, at 85–87.) The trial court ruled that was not an appropriate instruction and declined to give it. (*Id.* at 87–88.)

After deliberations, the jurors found Defendant guilty of both DUI charges. (R.T. of Aug. 20, 2014, at 110.) The trial court found Defendant guilty of excessive speed and not responsible for failure to drive in one lane. (*Id.* at 111.) The trial court later imposed sentence. (R.T. of Sep. 22, 2014, at 4–5.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT GIVING A VOLUNTARY ACT INSTRUCTION.

Defendant contends the trial court abused its discretion in not giving a voluntary act instruction. The applicable Arizona statutes provide as follows:

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act

A.R.S. § 13–201.

B. If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state. . . .

A.R.S. § 13–202(B).

A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:

1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.

2. If the person has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle.

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A.R.S. § 28-1381(A)(1) & (2). Under Arizona law, driving under the influence is a strict liability offense that does not require proof of any culpable mental state. *State v. Zaragoza*, 221 Ariz. 49, 209 P.3d 629, ¶ 20 (2009); *State v. George*, 233 Ariz. 400, 313 P.3d 543, ¶ 8 (Ct. App. 2013).

In the present case, Defendant acknowledged driving a vehicle and made no claim his driving was not voluntary. The trial court therefore correctly refused Defendant's requested voluntary act instruction.

Defendant contends, however, he was entitled to a voluntary act instruction because he did not know the liquid he drank contained alcohol. For two reasons, this Court does not agree with Defendant's contention.

First, as noted above, the Arizona statute requires "conduct which includes a voluntary act," and as discussed above, Defendant voluntarily drove his vehicle. There is no requirement that the State must prove a defendant voluntarily drank alcohol.

Second, assuming the State must prove a defendant voluntarily drank alcohol, the evidence showed Defendant voluntarily drank the Tesquin, which apparently contained alcohol.¹ Defendant contends he did not voluntarily drink alcohol because he did not know the Tesquin contained alcohol. But what Defendant is doing is confusing the voluntary act requirement with the mental state, for which there is none for the offense of driving under the influence. Because the statute does not require a defendant to have known he or she was drinking alcohol, there is no requirement that the defendant voluntarily drank the alcohol.

III. CONCLUSION.

Because the evidence showed Defendant voluntarily drove his vehicle, and there is no requirement that the State prove Defendant voluntarily drank alcohol, the trial court correctly refused Defendant's voluntary act instruction.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Tempe Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Tempe Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

¹This Court notes Defendant's BAC readings were 0.147 and 0.148, and this Court questions whether the two cups of Tesquin Defendant said he drank contained enough alcohol to give those readings. It may be that the alcohol in Defendant's system came from Defendant's drinking some other beverage containing alcohol.